No. 22507

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT J. DAVIS,

Appellant,

v.

EVERETTE H. WILLIAMS,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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STATEMENT OF JURISDICTION

The appellant, Robert J. Davis, hereinafter called appellant, or Davis, filed a claim as a secured claim in the bankruptcy proceeding pending in the United States District Court for the District of Oregon which commenced October 15, 1964 and is entitled "In the Matter of Portland Newspaper Publishing Company, Inc., Bankrupt, No. B 64-3282." Davis asserted a security interest in certain accounts receivable to which

claimed security interest the trustee interposed objections. After a hearing thereon, the Honorable Estes Snedecor, Referee in Bankruptcy, entered an order disallowing the appellant's claimed security interest (Transcript of Record, hereinafter Rec., 1).

Thereafter, appellant petitioned for review of the referee's order and the matter was heard before The Honorable Gus J. Solomon, Presiding Judge of the United States District Court for the District of Oregon. On August 22, 1967 Judge Solomon rendered an opinion sustaining the referee in holding that appellant's security agreement failed to comply with the requirements of the Uniform Commercial Code (Rec. 89). On November 7, 1967 Judge Solomon rendered an opinion denying appellant's claim to be subrogated and paid out of amounts payable to Rose City Development Company, Inc. (Rec. 113). A final order was entered by Judge Solomon on November 7, 1967 (Rec. 115).

This is an appeal from said orders. Jurisdiction is based upon Section 24(a) of the Bankruptcy Act, 11 U.S.C. § 47(a).

STATEMENT OF FACTS

Appellant's claim of a security interest is predicated upon an agreement dated December 13, 1963 between appellant and Portland Reporter Publishing Company, Inc., hereafter referred to as the Reporter. An assignment including a list of accounts re-

ceivable assigned were attached to the agreement, made a part thereof at the time of its execution and were covered by a single blue back. Said agreement and the attachments thereto were received as Exhibit 40; a copy appears as part of Exhibit 15. Subsequently, lists of accounts receivable assigned were prepared as of February 24, 1964 and April 21, 1964 and given appellant (Transcript of Proceedings, hereinafter Tr., 22-23). These documents are hereinafter referred to respectively as the December 13 agreement or Davis agreement, the February 24 memorandum or list and the April 21 memorandum or list.

The Reporter was later merged into the Portland Newspaper Publishing Company, Inc., the ultimate bankrupt. The facts as to the organization of the Reporter, its uncertain and threatened financial existence and the short and unsuccessful existence and demise of the bankrupt are fully set forth in the Referee's order which is before the court (Rec. 1). The transaction involving appellant and a similar transaction involving R. Anthony DuBay, hereinfter called DuBay, also an appellant, were prompted, the forms such transactions took and the manner in which they were carried on were dictated by the financial exigencies confronting both the Reporter and the bankrupt.

It is necessary for an understanding of appellant's contentions that the DuBay transaction, which occurred more than a year earlier, and the documents executed in connection therewith be reviewed.

On June 26, 1962, to enable the Reporter to obtain a loan in the amount of $25,000.00 from The First National Bank, hereinafter called the Bank, DuBay executed a collateral agreement in its favor (Rec. 19). On July 31, 1962, the Reporter and DuBay entered into an agreement (Tr. 16), a copy of which is attached to the DuBay claim, received as Exhibit 16, hereinafter called the DuBay agreement, to secure DuBay against any liability he might incur upon said collateral agreement. The agreement provided for the assignment to DuBay of certain advertising accounts receivable, hereinafter called advertising accounts, to be selected by DuBay and aggregating not more than $40,000.00 at any one time. At that time a formal assignment including a list or schedule of selected accounts was executed and made a part of the DuBay agreement. The agreement further provided in Paragraph Z for the use of similar assignments from time to time.

The only time the assignment form was used was when the DuBay agreement of July 31, 1962 was entered into (Tr. 16-17). Thereafter simple lists or schedules of assigned advertising accounts as of August 31, 1962, April 30, 1963, November 30, 1963, February 24, 1964, and April 21, 1964, were prepared (Tr. 16). The lists were in the form of memoranda, addressed to the Board of Directors, Don S. Willner, attorney, and DuBay, indicated they were from Keith Plotner, at that time controller of the Reporter and later of the bankrupt, and related to accounts receivable assigned to DuBay (Tr. 16-17).

A copy of each list was given DuBay. The lists, each of which specifically made reference to the prior lists, were typewritten and were not formally executed, nor did they bear any written longhand signatures. The actual selection of the specific accounts in the aforementioned lists was in each instance made by Plotner (Tr. 17, 45). The ledger cards covering the particular accounts selected were marked by Plotner to show their assignment to DuBay at the time the several lists were prepared (Tr. 17). DuBay did not participate in the foregoing events except to request and receive the lists of accounts receivable assigned to him.

The Uniform Commercial Code became effective in Oregon on September 1, 1963. Subsequent thereto a financing statement was executed by the Reporter and DuBay covering "accounts receivable" and duly filed September 30, 1963 (Tr. 2-3). Copies of the financing statements were received herein as parts of Exhibit 3.

On November 22, 1963, an accounts receivable loan and security agreement was entered into between the Reporter and Rose City Development Company, Inc., hereinafter called Rose City, to secure loans aggregating $55,300.00. The agreement, a copy of which was attached to the Rose City claim, received as Exhibit 17, provided for the assignment to Rose City of all accounts receivable, not otherwise identified, then existing or thereafter arising excepting accounts receivable theretofore assigned. Financ-

ing statements were duly filed and copies received as part of Exhibit 3.

On December 13, 1963, Davis executed a collateral agreement in favor of the Bank to secure an additional $25,000.00 loan by the Bank to the Reporter. (The transaction referred to in the Referee's Opinion (Rec. 27) on January 17, 1964 at which time a guaranty was executed and a savings account assigned involved a substitution of collateral, the original transaction occurring on December 13, 1963 (Tr. 419)). On the same day to secure Davis against loss the Davis agreement was executed and financing statements covering accounts receivable, copies of which were received as part of Exhibit 3 were duly filed in Multnomah County and with the Secretary of State (Tr. 2-3). The Davis agreement, hereinafter set forth, and the DuBay agreement were identical except for names, dates, the collateral agreements referred to, and one other minor item not herein relevant (See Exs. 15, 16 and 40).

The Davis agreement at the time of its execution likewise included as a part thereof an assignment, which incorporated a schedule of advertising accounts receivable as of November 30, 1963 (Tr. 68-70, Ex. 40). The schedule differed, however, in one material respect from schedules or lists of accounts assigned to DuBay which included only advertising accounts receivable. It had been originally contemplated that the accounts receivable assigned to Davis likewise would consist only of advertising accounts. However, Du-

Bay was given a preference in the selection of advertising accounts to be assigned (Tr. 75, 91).

Accordingly *it was discovered, prior to December 13, 1963* (Tr. 70-71), that the aggregate balance of the remaining advertising accounts deemed satisfactory and collectible available for assignment to Davis would be less than $35,000.00, and that *to provide Davis with a sufficient amount of accounts receivable it would be necessary to assign circulation accounts* (Tr. 69-70). Upon DuBay's unwillingness to accept circulation accounts (Tr. 70, 85) Davis agreed to accept the assignment of such accounts to supplement the difference between the aggregate of the available specific advertising accounts assigned to him and $35,000.00, said difference being $7,837.51 (Tr. 69). The inclusion of circulation accounts was discussed and agreed upon at a meeting prior to December 13, 1963, attended by Davis and Robert E. Webb, president, publisher and a director (Webb signed the December 13 agreement on behalf of the Reporter), Robley Evans, a director, and Plotner, controller of the Reporter (Tr. 85-86). Accordingly, the schedule of assigned accounts *prepared prior to December 13, 1963* (Tr. 70) (and set forth in the assignment which was part of the original Davis agreement) contained the words "circulation accounts receivable to total $7,837.51" immediately below the enumeration of the specific assigned accounts which was followed by the figure $35,000.00 (Ex. 40).

Notwithstanding the deficiency in available adver-

tising accounts receivable, the need to assign circulation accounts (Tr. 26, 69-70), the determination and agreement to include them in the security to be provided, and the aforementioned reference thereto in the schedule portion of the assignment form, *no change in language or other specific reference to the two types of accounts receivable was made* in the Davis agreement (Ex. 40).

At the same time and as part of the transaction whereby Davis undertook to guarantee the payment of the Bank's loan to the Reporter and to induce Davis to do so, on December 13, 1963, Rose City and the Reporter executed a subordination agreement to place Davis in a superior secured position (Tr. 238-239). A copy of the subordination agreement appears as part of Exhibit 15 and is set forth in the appendix.

As in the case of DuBay, the assignment form was used only at the time the Davis agreement was entered into on December 13, 1963 (Tr. 23). Thereafter, on February 24, 1964 and April 21, 1964, lists of assigned accounts receivable were prepared by Plotner (Tr. 22-26). Again these lists were in the form of typewritten memoranda from Plotner to the Reporter Board of Directors, Don S. Willner, and Davis, were indicated to be from Plotner, controller, and bore no written longhand signature (Tr. 23). A copy of each memorandum was given Davis. The specific advertising accounts receivable were selected solely by Plotner (Tr. 68-70, 76-78, 125), who properly marked the ledger cards for the specific adver-

tising accounts. No ledger cards for any circulation accounts were marked (Tr. 26, 71). At the time the February 24 and April 21 lists were prepared the aggregate of the suitable advertising accounts receivable available for assignment to Davis was substantially less than $35,000.00 and circulation accounts were necessary to provide security in that amount (Tr. 25, 69-70). Accordingly, both lists included circulation accounts for specific amounts (Tr. 25, Ex. 10).

At this point it is pertinent to note that Don S. Willner and the law firm of Lenon & Willner were very closely identified with the Reporter and Rose City and had a very intimate knowledge of its operations and financial condition (Rec. 16-17). They represented the Reporter and Rose City in the foregoing transactions and Mr. Willner also, to the extent they were represented, represented DuBay and Davis. Finally, all of the foregoing agreements, that is the DuBay agreement, the Rose City agreement, the Davis agreement and the subordination agreement, were prepared by Mr. Willner. It is further pertinent to note that because of the relationships existing between the Reporter and DuBay and Davis, who served on the Reporter's board of directors, that they were not independently represented but relied upon Willner and Reporter personnel, including Plotner, to do what might be necessary to protect their interests and take whatever steps might be required in the performance of the agreements involved.

No question was at any time raised concerning the validity of the agreements and assignments and Plotner in preparing lists was attempting to comply with the provisions of the DuBay and Davis agreements (Tr. 42-44).

Advertising accounts receivable were accounts of advertisers who more or less regularly advertised in the Reporter and, for the most part, on the basis of contracts or specific quantity space purchases. The account balances continuously fluctuated (Tr. 67, 89) as advertisements were inserted and payments made. Charges for space advertising were made on a daily basis (Tr. 67). There was no indication, nor was there any testimony to the effect that the aggregate of the balances of advertising accounts receivable was materially greater or less at any particular time, except for such variations as were related to the number of Thursdays and Fridays in a particular month and as might result from discontinuance of advertising by a particular advertiser or from inability to collect a particular account (Tr. 65, 67).

Circulation accounts were accounts of so-called district managers who dealt with delivery boys and wholesale dealers whose accounts were normally paid on a monthly basis after the close of each month (Tr. 72-73). The aggregate of circulation accounts balances peaked at the close of each month, reached some $40,000.00 to $45,000.00 or thereabouts and continued at such level right up to the close of operations (Tr. 73-74). Payments thereon were normally

made between the 5th and 10th of each month. However, the aggregate of unpaid balances upon circulation accounts was always at least $5,000.00 or more (Tr. 73) and indebtedness for the current month was accruing as payments were being made. It was estimated that the aggregate of the balances on circulation accounts, if they had been accrued on a daily basis, would on any particular date have been not less than a minimum of $15,000.00 and in all probability greater (Tr. 66, 71-75).

Exhibit 29, a summary prepared by Plotner for and introduced by the trustee, showed the balances on the specific advertising accounts contained in the Davis April 21 list on the dates of June 1, July 1, and October 1, 1964, the amounts collected as of a date near the close of December, 1964, but not otherwise specified, and the balances uncollected as of said date (Tr. 269-271).

The exhibit was prepared with reference to dates of June 1, and July 1, 1964 because of the manner in which the books and records of the bankrupt were kept and which precluded the determination of balances on June 15, 1964, which was precisely four months prior to the commencement of bankruptcy proceedings on October 15, 1964.

The exhibit indicates that the aggregate of the balances of the specific advertising accounts in the April 21 list was $18,615.45 on June 1, $16,076.10 on July 1, and $10,510.06 on October 1. The amount collected thereon as of the unspecified December date

was $7,486.85 (Tr. 270), leaving an aggregate of uncollected balances of $3,023.21, but indicated in the exhibit to be $2,420.90. Plotner testified that he regarded this amount as 70% collectible (Tr. 271).

The same exhibit showed that the aggregate balance of the circulation accounts receivable was greater than $18,852.58 on June 1, July 1, and October 1, 1964, and also that the amount collected by the unspecified date in December exceeded said sum (Tr. 273).

No testimony was offered as to the aggregate of the balances of the advertising accounts receivable in the list attached to the Davis agreement of December 13, 1963. Obviously the aggregate balance of the circulation accounts receivable was greater at all times and the amount collected exceeded the figure of $7,837.51, which, in the December 13 list was indicated as the amount necessary to be obtained from circulation accounts to provide Davis with the intended security.

Because of the Referee's ruling as to the invalidity of the Davis' security interest, no consideration was given nor determination made as to whether amounts collected upon the advertising accounts receivable listed in the schedule attached to the Davis December 13 agreement and the amount of circulation accounts therein designated should be applied upon the Davis claim as proceeds of security therefor.

Both Judge Solomon (Rec. 89) and the Referee (Rec. 1) before him disposed of the Davis claim on

the basis of there being no valid security interest and therefore gave no consideration to the question of whether, were there a valid security interest there would have been a voidable preference in favor of Davis. It is presumed that in such a situation their respective views would have been the same as to the Davis claim as they were with respect to the Rose City claim.

Judge Solomon rejected Davis's contention that on the basis of the Rose City subordination agreement he was entitled to be subrogated to its position and to be paid out of amounts payable to it on its claim (Rec. 113, 115). Although appellant's Notice of Appeal (Rec. 118) indicated that he was appealing from this portion of Judge Solomon's final order as well as the ruling on the validity of the security agreement, appellant has determined to accept the court's opinion as to the subrogation contention and is now abandoning his appeal with respect thereto. In doing so, however, appellant is not waiving or abandoning his claim to a security interest position superior to that of Rose City by virtue of said subordination agreement.

ISSUES PRESENTED

There are two basic issues presented as to appellant Davis' claim.

First, did Judge Solomon err in concluding that the Davis agreement of December 13, 1963, the assignment and schedule attached thereto and the lists

of February 24 and April 21, 1964, failed to create a valid security interest in favor of appellant Davis in certain specific advertising accounts and in the circulation accounts?

Secondly, would such security interest as may have been created in favor of appellant Davis in any of said accounts by virtue of charges which came into existence within a period of four months prior to the filing of the bankruptcy petition, run afoul of the supposed conflict between Section 60 of the Bankruptcy Act, 11 U.S.C. § 96 and UCC § 9-108 (ORS 79.1080) and be invalid as against the respondent trustee as a voidable preference?

SUMMARY OF ARGUMENT

1. Appellant Davis had a valid security interest in the balances on the filing date of the advertising accounts receivable named in the April 21 list and in the balances on the filing date of the circulation accounts.

a. The December 13 agreement, assignment and list attached thereto, and the February 24 and April 21 lists constituted valid security agreements.

National-Dime Bank of Shamokin v. *Cleveland Bros. Equipment Co., Inc.*, 20 Pa. D & C 2d 511, 1 UCC Rep. 454 (1959)

In re Platt, 3 UCC Rep. 276 (D.C., E.D., Pa. Ref. Op. 1966)

In re Platt, 257 F. Supp. 478, 3 UCC 717 (3 Cir. 1966)

In re Bengston, 3 UCC Rep. 283 (D.C. Conn., Ref. Op. 1965)

In re Lambert & Braceland Co., 29 F.2d 758 (D.C., E.D., Pa. 1928)

Lee v. *State Bank & Trust Co.*, 54 F.2d 518 (2 Cir. 1931)

Provident Tradesmen's Bank and Trust Company v. *Pemberton*, 196 Pa. Super 180, 173 A2d 780 (1961)

Benedict v. *Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L.2d 991 (1925)

Benedict v. *Lebowitz*, 346 F.2d 120 (2 Cir. 1965)

In re Excel Stores, 341 F.2d 961, 2 UCC Rep. 316 (2 Cir. 1965)

Plemens v. *Didde Glaser, Inc.*, 244 Mc. 556, 224 A.2d 464 (1966)

National Cash Register Co. v. *Firestone & Co., Inc.*, 346 Mass. 255, 191 N.E.2d 471, 1 UCC Rep. 460 (1963)

UCC § 1-201(3) (ORS 71.2010(3))

UCC § 1-205(1), (3) (ORS 71.2050(1), (3))

UCC § 2-208(1), (2), (3) (ORS 72.2080(1), (2), (3))

UCC § 9-203(1)(b) (ORS 79.2030(1)(b))

UCC § 1-201(39) (ORS 71.2010(39))

UCC § 9-402(5) (ORS 79.4020(5))

UCC § 9-110 (ORS 79.1100)

UCC § 1-102 (ORS 71.1020)

b. The Davis security interest covered circulation accounts as well as specifically named advertising accounts.

c. Future charges and future circulation accounts receivable are covered.

In re Platt, 3 UCC Rep. 276 (D.C. E.D. Pa. Ref. Op. 1966)

2. Appellant's security interest was not invalidated as a voidable preference because charges to the advertising and circulation accounts came into existence after June 15, 1964.

Rosenberg v. *Rudnick*, 262 F. Supp. 635 (D.C. Mass. 1967)

In re Newkirk Mining Company, 54 Berks County, L.J. 179, 1 UCC Rep. 468 (1962)

In Re Goodfriend, 2 UCC Rep. 160 (D.C., E.D., Pa. 1964—apparently not officially reported)

Manchester National Bank v. *Roche*, 186 F.2d 827 (1 Cir. 1951)

In re Pusey, Maynes, Breish Co., 122 F.2d 606 (3 Cir. 1941)

Benedict v. *Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L.2d 991 (1925)

Section 60. Bankruptcy Act (11 U.S.C. § 96)

UCC § 9-108 (ORS 79.1080)

UCC § 9-204 (2)(d) (ORS 79.2040(2)(d))

UCC § 9-205 (ORS 79.2050)

UCC § 9-303 (ORS 79.3030)

Henson, Ray D., " 'Proceeds' Under the Uniform Commercial Code", 65 Col. L. Rev. 232 (1965), 2 UCC 567

Krause, Sidney, "The Code and the Bankruptcy Act, Three Views on Preferences and After-Acquired Property," 42 N.Y.U. L. Rev. 278 (1967)

"After-Acquired Property Security Interests in Bankruptcy: A Substitution of Collateral Defense of the U.C.C.," 77 Yale L.J. 139 (1967)

44 Texas L.R. 1369

Friedman, Harold, "The Bankruptcy Prefer-

ence Challenge to After-Acquired Property Clauses under the Code," 108 Penn. L. Rev. 194

Coogan, Peter F., "Article 9 of the Uniform Commercial Code; Priorities Among Secured Creditors and the 'Floating Lien'" 72 Harvard L. Rev. 838

Coogan, Peter F., "The Effect of the Uniform Commercial Code upon Receivables Financing—Some Answers and Some Unresolved Problems," 76 Harvard L. Rev. 1529

ARGUMENT

First, as to the validity of the security interest, Judge Solomon in his opinion stated that "Davis' claim, like DuBay's, must be disallowed and for the same reason" (Rec. 104). As to DuBay's claim the court observed the memoranda did not validly assign any accounts to DuBay because they did not follow the form of the executed assignment attached to the DuBay agreement, they did not contain words of assignment nor the signature of an officer of the corporation and they did not refer to future accounts (Rec. 102).

Referee Estes Snedecor in his opinion made the same observations and certain additional observations, including that the Davis agreement did not cover circulation accounts (Rec. 30-31).

Since the argument hereinafter made is so directly related to the Davis agreement, the assignment and the lists, it is desirable and necessary that said agree-

ment, the assignment and lists be set forth and they appear in the appendix hereto. Also, since such documents must be examined in terms of the provisions of the Uniform Commercial Code, the applicable provisions of the code and Official Comments thereon are likewise set forth in the appendix.

It is submitted that there is basis for holding, contrary to the decisions of both Judge Solomon and Referee Snedecor, that

(1) The Davis agreement of December 13, 1963, the assignment and list attached thereto, and the lists of February 24 and April 21 constituted valid security agreements and created a security interest in his favor.

(2) The security interest in favor of Davis covered both specific advertising and circulation accounts.

(3) The security interest in favor of Davis covered future charges to specific advertising accounts and future charges to as well as future circulation accounts.

Before proceeding to discuss, construe and evaluate the Davis security agreement documents, certain observations should be made. First, no question can be raised concerning the financing statements and the extent of their coverage. Financing statements were properly executed and filed in compliance with the applicable statute (Tr. 1, Ex. 3). They indicated the collateral to be "accounts receivable" and the proceeds

thereof. This term is sufficiently broad to include both circulation accounts and advertising accounts receivable. Moreover, it is sufficiently inclusive to extend to and cover not only such accounts at the time the financing statements were executed, but also future circulation accounts and future charges thereto and future charges to the named and designated advertising accounts. *National-Dime Bank of Shamokin* v. *Cleveland Bros. Equipment Co., Inc.*, 20 Pa. D & C.2d 511, 1 UCC Rep. 454 (1959); *In re Platt*, 3 UCC Rep. 276 (U.S.D.C., E.D. Pa. Ref. Op. 1966); *In re Platt*, 257 F. Supp. 478, 3 UCC Rep. 717 (3 Cir. 1966).

Secondly, the DuBay and Davis transactions were not the customary type of commercial transactions in which business lenders make business loans to business borrowers. On the contrary, they were transactions in which public spirited citizens, motivated by a desire to lend assistance to a struggling newspaper, which was born in the course of a strike, sought to assist the debtor in obtaining bank loans and in which the debtor sought to protect them by security interests in the only assets which it had, namely present and future accounts receivable. The Davis security agreement documents must be examined against the background of these particular transactions.

The DuBay agreement, which as noted, is for all relevant purposes identical to the Davis agreement was entered into July 31, 1962, prior to the enactment of the Uniform Commercial Code. At the time of its

execution a formal assignment, including a list of advertising accounts, was likewise prepared and executed and attached to the DuBay agreement. The assignment and list and the manner in which they were employed were again identical to those in the Davis transaction.

Between the date of the DuBay agreement and that of the Davis agreement there were two occasions, on August 31, 1962 and April 30, 1963, on which advertising accounts were selected for assignment to DuBay. Thereafter on three additional occasions, on November 30, 1963, February 24, 1964 and April 21, 1964, when selections were also made for Davis, advertising accounts were selected for assignment to DuBay. Although the DuBay agreement provided that DuBay, the assignee, would make the selection of specific accounts receivable with balances aggregating not more than $40,000 at any one time, in each instance, the specific accounts assigned were selected by Plotner, controller of the assignor, rather than by DuBay. Again, although paragraph 2 of that agreement contemplated that a formal assignment would be prepared each time accounts were selected specifically assigning such accounts, in none of these five instances was a formal assignment form used; instead memoranda containing a list of the accounts and their balances were prepared by Plotner addressed to DuBay, Don S. Willner, his attorney, and the Reporter's Board.

The particular accounts selected at the time each

list was prepared differed to some extent from the accounts included in the prior list. This was inevitable from the very nature of things, as balances in particular accounts were constantly fluctuating and were being either increased, reduced or paid off. Some advertising accounts may have been closed out or abandoned and new accounts created and again this was contemplated, as various provisions of the DuBay agreement will attest. As has been noted above, the prime consideration moving Plotner to select a particular list of accounts was to get good accounts aggregating $35,000 as of the date of selection without regard to what their balances might thereafter be.

It is submitted that the foregoing adds up to a course of dealing and course of performance with respect to the DuBay agreement, its provisions, the requirements thereof, and the parties' understandings relative thereto. See UCC §§ 1-201(3), 1-205(1) and (3), and 2-208(1), (2) and (3) and *In re Bengston*, 3 UCC Rep. 283 (D.C. Conn., Ref. Op. 1965) discussed in the Appendix at p. 21.

It is further submitted that the parties thus proceeded either as if the DuBay agreement did not contain a provision requiring the preparation of formal assignments, or as if that provision had been amended by the parties to provide that the requirements thereof would be met by the preparation and the delivery of mere lists of accounts receivable, or as if the requirements of that provision had been expressly waived. In short, it is submitted that

the preparation of lists by Plotner and their delivery to DuBay met the requirements of the DuBay agreement whatever they may be determined to be.

Davis came into the picture some sixteen months after the DuBay agreement had been entered into and after DuBay had received two lists in addition to the original assignment. The Davis agreement was prepared by the same attorneys who prepared the DuBay agreement, who represented both the debtor and DuBay (Rec. 27), and who represented Davis to the extent he was represented. By this time Davis, as well as DuBay, was a member of the Reporter's Board of Directors and likewise conversant with the situation relating to the DuBay agreement and the manner of performance thereunder. The testimony makes clear that thereafter with respect to Davis, the Reporter and its employees, particularly Plotner and Robert E. Webb, followed precisely the same course of dealing in selecting accounts to be assigned, except, of course, that circulation accounts were necessarily included, in preparing and providing lists thereof as had been followed with respect to DuBay.

In the light of the foregoing it seems quite clear that the Davis agreement must be viewed and construed whatever its specific language may be, as it was in fact viewed and construed by the parties, in the light of the DuBay agreement as supplemented by the course of dealing between the Reporter and DuBay relative thereto.

See in support of this contention *In re Lambert &*

Braceland Co., 29 F.2d 758 (D.C.E.D., Pa., 1928); *Lee* v. *State Bank & Trust Co.*, 54 F.2d 518 (2 Cir., 1931); and *Provident Tradesmen's Bank and Trust Company* v. *Pemberton*, 196 Pa. Super 180, 173 A.2d 780 (1961).

In *In re Lambert & Braceland Co.* the question concerned the rights of a creditor and the trustee to the proceeds of accounts receivable substituted by the bankrupt assignor a few days prior to bankruptcy. The assignment agreement granted the debtor the privilege "to substitute other accounts of equal amount and validity for the accounts listed in the said schedule." In practice accounts were not substituted simultaneously, but were collected, the proceeds deposited to the debtor's account without earmarking and new accounts substituted at the close of each month. The court, after pointing out that if the parties understood and agreed at the time the assignment was executed that the arrangement would be carried out in the manner in which it in fact was the transaction was void under *Benedict* v. *Rattner*, 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991, then went on to observe:

> "If, on the other hand, the original agreement required the substitutions to be simultaneous with the collection of accounts, or if (what is equivalent thereto) it required the assignor to hold the moneys collected separate and intact for the assignee's benefit until new accounts were assigned to take the place of the old, *then such agreement was clearly modified and changed by actual practice known and assented to by the assignee* . . ." (Emphasis supplied).

In *Lee* v. *State Bank & Trust Co.*, 54 F.2d 518 (2 Cir., 1931) the court, after discussing at some length the practice of the bankrupt and the defendant bank with respect to goods returned by customers whose accounts had been assigned and pledged to secure loans made by the bank, said, at p. 521:

> "Under these circumstances we cannot construe the situation as to loans made subsequent to March 13th as being other than an agreement to disregard the written requirement as to accounting for returns."

Provident Tradesmen's Bank and Trust Company v. *Pemberton*, 196 Pa. Super. 180, 173 A.2d 780 (1961), involved a security agreement containing a waiver of "all notices whatsoever in respect to this agreement." Notwithstanding the court affirmed a judgment for the plaintiff, who asserted a right to receive notice, on the opinion of the trial court judge which read in part, at p. 784:

> "In the instant case the course of dealings between the parties and the custom existing in the trade certainly justified the defendant in expecting to receive notice from the bank of cancellation of the policy of insurance. The bank receives notice from the insurer as a loss payee named in the insurance policy but the dealer as a stranger to the policy must rely on the bank to notify him so that he can protect himself by procuring new coverage.
>
> The surety agreement signed by Prusky contains a waiver of 'all notices whatsoever in respect to this Agreement' and also a provision

> that 'the undersigned's liability under this agreement is absolute and unconditional and shall not be affected or released by reason of any action taken by Bank which is hereby consented or agreed to.'
>
> It is clear that said provisions apply to the text of the agreement and do not apply to a custom or usage of the trade which is binding on the parties irrespective of said text."

Proceeding from the foregoing analysis, it would seem the memoranda of February 24 and April 21 can and should be accepted as satisfying the requirements of valid security agreements.

To have a valid and enforceable security agreement there must be at most a writing signed by the debtor and describing the collateral, UCC § 9-203(1)(b) (ORS 79.2030(1)(b)) and Official Comment thereon. It would also be necessary or at least desirable that the writing contain words of grant.

When taken in conjunction with the Davis December 13 agreement there is no question that the February 24 and April 21 memoranda meet the requirements for valid security agreements. It is arguable, however, that all these requirements were met by these memoranda themselves.

The memoranda of February 24 and April 21 certainly were writings.

Both memoranda use the term "assignment" which imports grant. The February 24 memorandum is designated "ACCOUNTS RECEIVABLE ASSIGN-

MENT TO ROBERT J. DAVIS" and indicates the following list of accounts receivable "is to show the current standing of the original assignment of these accounts. . . ." In the list of the accounts there appear two subheadings, one reading "ADDITIONAL CLASSIFIED ASSIGNED AS OF FEB. 24, 1964" and the other "ADDITIONAL DISPLAY ASSIGNED AS OF FEB. 24, 1964." Following the specific advertising accounts assigned appears the following: "ALL CIRCULATION ACCOUNTS RECEIVABLE ARE HEREBY ASSIGNED IN THE AMOUNT OF $16,690.19."

The April 21 memorandum is similarly designated "ACCOUNTS RECEIVABLE ASSIGNMENT TO ROBERT J. DAVIS" and indicates that the list of accounts receivable "is to show the current standing of the original assignment of these accounts."

While the memoranda merely indicate that accounts receivable were assigned and do not employ words such as are more customarily employed, as in the assignment form attached to the Davis December 13 agreement in which the following appears:

> "hereby transfers, assigns and sets over to Robert J. Davis, his successors and assigns, all of the right, title and interest of the Assignor"

it is submitted one looking at the memoranda would be no less aware that accounts receivable had in fact been assigned to Davis than he would be had the assignment form been used on February 24 and April 21, 1964.

The memoranda show they originated with the debtor. They bear the typewritten name of the debtor's controller. In *Benedict* v. *Lebowitz*, 346 F.2d 120, (2 Cir., 1965), a chattel mortgage was executed, together with a financing statement on the standard form, Form UCC-1. Lebowitz did not add his own signature to the financing statement because of a misinterpretation of the instructions printed at the top of the form, nor did he sign the chattel mortgage which was the security agreement and which was filed together with the financing statement. Since neither document was signed, the question before the Referee was whether, in view of the circumstances obtaining, "the insertion of Lebowitz's name in the body of the financing statement constituted a 'signing' by him within the meaning of 'the statute'." The court held, along with the Referee and the lower court that Lebowitz had signed the financing statement in the manner required by law. In support of its decision, the court said at page 122:

> "Referee Trevethan cited Conn. Gen. Stat. § 42a-1-201(39) (Uniform Commercial Code § 1-201 (39)), which provides: '*"Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.*' With regard to the requirement that a symbol be affixed to the writing, the referee referred to the comment by the authors of the Uniform Commercial Code that the symbol 'may be printed, stamped, or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead.' As for the requirement

that there be an intention to authenticate the writing, the referee stated that this simply meant an intention 'to evidence or establish its genuineness.'

Referee Trevethan held that 'the act of Lebowitz's secretary in typing his name on the financing statement at his direction, coupled with his subsequent act of filing the statement, constituted Lebowitz's effort and indicated his intention to authenticate the statement, i.e., to establish it, so far as Lebowitz was concerned, as the genuine financing statement of the transaction.' The referee noted that Lebowitz neglected to inscribe his signature at the bottom of the financing statement as well, only 'because of his misunderstanding of the instructions' of Form UCC-1. The referee added that Lebowitz's 'filing of the chattel mortgage * * * with the financing statement serves quite abundantly further to demonstrate that the financing statement was an honest, genuine statement of Lebowitz.' "

It would seem that the selection of the accounts to be assigned, their identification by appropriate marking on the ledger cards, and the preparation of a memorandum containing a list of said accounts and of their balances, all such acts being performed by the controller, coupled with the fact that the memorandum indicates it is addressed to the Reporter's Board of Directors, among others, and is from its controller whose name appears thereon, together add up to an indication of the *Reporter's intention to authenticate the statement*, to follow the language of the court in *Benedict* v. *Lebowitz*,—that is to establish it as a gen-

uine security agreement—and this is all that UCC § 1-201(39), (ORS 71.2010 (39)) requires.

The fact that in *Benedict* v. *Lebowitz* a financing statement was involved rather than a security agreement in this instance does not weaken appellant's contention in any way. Because of its function to give notice it would seem far more important that a financing statement than a security agreement strictly comply with the statutory requirements as to signing. In any event there is nothing in UCC § 1-201(39) (ORS 71.2010(39)) to suggest that the definition of signing applies to a financing statement but not a security agreement.

Other cases, all involving financing statements—apparently there are none involving security agreements—in which "signings" other than in precisely accurate manner were held not to defeat the security interest of the secured party are: *In re Excel Stores*, 341 F.2d 961, 2 UCC Rep. 316 (2 Cir. 1965); *In Re Bengston*, 3 UCC Rep. 283 (D.C., Conn. Ref. Op. 1965); *Plemens* v. *Didde Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966). These cases refer to UCC § 9-402(5) (ORS 79.4020(5)) and reflect the apparent policy of courts generally in applying the UCC to disregard minor errors or deviations which are not seriously misleading.

As to the description of the collateral, the specific advertising accounts receivable assigned are identified by names and balances as of a specified date. Circulation accounts are designated as such. Accordingly,

there appears to be no question whatsoever that the collateral was reasonably identified so as to satisfy the statutory requirements.

The courts have applied UCC § 9-110 (ORS 79.1100) consistently with the policy as set forth in the Official Comment. It should further be emphasized that the Uniform Commercial Code, as UCC § 1-102 (ORS 71.1020) provides, is to be liberally construed and applied, among other purposes, "to simplify, clarify and modernize the law governing commercial transactions." For this purpose the Code introduced notice filing. Notice to creditors is effected by the filing of a financing statement providing a creditor with only the minimum information necessary to enable him to make inquiry of either the secured party or the debtor to learn the nature, extent and other details regarding the security. Thus, in *National Cash Register Co.* v. *Firestone & Co., Inc.*, 346 Mass. 255, 191 N.E.2d 471, 1 UCC Rep. 460 (1963), the security agreement covered the business at a stated address "together with all its good-will, fixtures, equipment and merchandise. The fixtures specifically consist of the following: All content of luncheonette including equipment such as: booths and tables" followed by a number of specifically designated items, not including a cash register which was delivered after the security agreement was executed. The court quoted from UCC § 9-110 (ORS 79.1110) and UCC § 9-203 (ORS 79.2030) and then said:

> "contrary to the plaintiff's contention, we are of the opinion that the security agreement is broad

> enough to include the cash register, which concededly did not have to be specifically described. The agreement covers 'All contents of luncheonette including equipment such as,' which we think covers all those contents and does not mean 'equipment, to wit.' "

In *National-Dime Bank of Shamokin* v. *Cleveland Bros. Equipment Co., Inc.*, 20 Pa. D. & C.2d 511, 1 UCC Rep. 454 (1959) defendant claimed the description of a certain "Unit" Model 614 backhoe or shovel was not only insufficient but misleading. The court after quoting from UCC § 9-110 (ORS 79.1100) and the Official Comment thereon said:

> "We think the description of the backhoe or shovel in the instant case 'reasonably identifies the thing described' (Section 9-110 of the Uniform Commercial Code, 12A Purdon's Penna. Statutes, Sec. 9-110, supra) and that this item was sufficiently described to identify it without the aid of the serial number. We believe that the defendant was put on notice that the equipment belonging to Harry D. Reitz was subject to security interests. It had notice of the parties who held the security interests and it was under a duty to inquire as to whether or not the equipment with which it was dealing was subject to such a security interest."

And see *In re Excel Stores*, 341 F.2d 961, 2 UCC Rep. 316 (2 Cir. 1965); *In re Platt*, 3 UCC Rep. 276 (D. C., E.D., Pa. Ref. Op. 1966) and the same case on appeal 257 F. Supp. 478, 3 UCC. Rep. 717 (D.C., Pa. 1966).

If a creditor did in fact make inquiry would the security agreement or the lists have been exhibited to him? It is doubtful. More likely the secured party or the debtor, as the case may be, would have advised that the secured party had a security interest in the designated advertising accounts and in circulation accounts. If the secured party or the debtor had in fact exhibited the lists to the creditor, would not the creditor have been informed as to what the claimed security interest of the secured party was? The answer is, obviously so. Could the creditor have thereafter contended that he did not know what accounts receivable the secured party had had, or at least claimed to have had, assigned to him?

The referree and the trustee appellee recognized that the Davis December 13 agreement, and the assignment and list attached thereto, coupled with the proper filing of the financing statements, created a security interest in favor of Davis in the advertising accounts receivable therein specified to the extent of the then outstanding balances although disputing any security interest in future balances and circulation accounts (Rec. 33). Thus the trustee in contending and Judge Solomon and Referee Snedecor in holding that appellant Davis did not have a valid security interest are, in effect, stating that an inquiring creditor could have requested he be shown the Davis agreement, the February 24 and April 21 lists, and then after having seen them, have concluded that he could safely ignore the financing statement and Davis' claimed security interest in the specifically des-

ignated advertising accounts and in the circulation accounts because the February 24 and April 21 memoranda were not in the proper assignment form, did not contain formal words of grant and bear a longhand signature on behalf of the Portland Reporter Publishing Co. The mere statement of this conclusion is sufficient to demonstrate its invalidity.

Were circulation accounts covered? Judge Solomon in his opinion notes that appellant Davis "contends that he is entitled to circulation accounts totalling $18,752.58, the amount of the circulation accounts listed on the April 21, 1964 memorandum" (Rec. 104). It is not clear from the following sentence in that opinion whether he is of the view that circulation accounts were not covered by the Davis security agreement or that the particular circulation accounts were not covered because of their after-acquired nature. Referee Snedecor left no doubt on this score and categorically stated that the purported security agreement was limited to advertising accounts (Rec. 30).

It is true that the first WHEREAS clause of the Davis agreement, which is a poorly drafted and somewhat incomplete document with ambiguous and conflicting language, makes reference solely to accounts receivable for advertising services. However, as the testimony showed (Tr. 69-70), before the Davis agreement was executed it was discovered that it would be necessary to assign circulation accounts to him to provide him with the $35,000.00 minimum amount of

accounts receivable. Moreover, as noted, it was specifically determined at a meeting between Davis and officials of the Reporter including Robert E. Webb, the president, who signed the December 13 agreement, that circulation accounts would be included (Tr. 85-86). Thus the list of accounts attached to the assignment and made a part of the Davis agreement specifically showed that circulation accounts were assigned for the amount of $7,837.51, although the agreement itself was not specifically amended.

However, the assignment and list were attached to, and together with, the Davis agreement constituted a single instrument and must be so read. In view thereof and the determination of the parties at their meeting before the December 13 agreement was executed the recital in the first WHEREAS clause can not be construed as excluding circulation accounts, but the agreement must be deemed to have been amended to provide that Davis acquired a security interest in the specific advertising accounts designated and in all circulation accounts; albeit the extent of his security interest in all circulation accounts may have been limited to the amount by which the aggregate of the balances of the specific advertising accounts was less than $35,000.00. Thus, it is almost as if appellant Davis had a two-part security interest—one part in the designated advertising accounts for the full balances of said accounts, and separately therefrom, a second part in all circulation accounts in an amount equal to the difference between the

aggregate of the balances of the designated advertising accounts and $35,000.00.

The Referee's observation that a creditor looking at the Davis agreement would have no reason to assume that he had a security interest in the circulation accounts is not correct. A creditor would have to look at the whole agreement, including the assignment and the list as a part thereof, which clearly spelled out circulation accounts. Certainly inquiry of either the secured party or the debtor would have removed any possibility of doubt. Nor would the financing statement serve as a basis for denying a security interest in circulation accounts as they come within the term "accounts receivable."

As to Judge Solomon's and the Referee's observation that the Davis agreement did not extend to future accounts, some clarification is necessary. A distinction must be made between advertising accounts and circulation accounts. Appellant concedes that *it was not intended he have a security interest in advertising accounts receivable created in the future*, that is accounts of advertisers, *other than those specifically named* in the lists from time to time provided him. At the same time appellant Davis contends that *it was intended he have a security interest in all future charges, if any, to such named accounts.* Thus, paragraph 1 of the December 13 agreement makes reference to the selection of such accounts receivable as shall total not less than $35,000.00 nor more than $40,000.00 at any one time and further states "In the event that the total amount of the accounts *at any*

time exceeds $40,000.00, then there shall be a prorata deduction from the accounts so that the total is not more than $40,000.00." (italics supplied). This possibility could occur only if there were future charges to such accounts and such charges were taken into account. If what was intended was that the security interest extend only to the balances of named or selected accounts existing at the time of selection, then obviously the sentence quoted was unnecessary, because at the time of selection there would be no difficulty in determining what the balances of selected accounts were and in selecting accounts the aggregate of whose balances did not exceed $35,000.00. (Although the agreement used the figure $40,000.00, it was never intended to provide more than $35,000.00 of accounts receivable (Tr. 69, 91)). As a matter of fact Plotner testified that in selecting accounts for the lists prepared by him he was concerned only with getting good accounts which aggregated $35,000 at the time of selection regardless of "what the balances would be today, tomorrow, the day after tomorrow, or a month from today" (Tr. 93-94).

It is further appellant's contention that the agreement being deemed amended to included circulation accounts must also be construed as giving him a security interest in all circulation accounts, including future accounts as well as future charges to circulation accounts existing on April 21, 1964. Appellant categorically rejects the Referee's suggestion that only circulation accounts in existence at the time a particular list was prepared and the balances owing were

covered at most. No attempt was made to designate or otherwise limit circulation accounts in the references thereto in the lists. The only limitation was the portion of the $35,000 total security which was collateralled by circulation accounts, such amount being that shown from time to time in the lists provided Davis. In this respect the designation of circulation accounts, as extending to all circulation accounts, was no more circumscribed than was the designation of accounts receivable in the assignment to Rose City.

Moreover, the security interest obtained by appellant Davis would have been well nigh worthless if it was confined to balances of specific accounts at the time they were selected. These accounts were continuously revolving—that is payments were made and new charges incurred. Conceivably the balance in a particular account might be reduced or paid out between the time the account was examined and marked by Plotner and the time a particular list was prepared and delivered to Davis. Obviously to make the changes in the lists necessary to include future charges would have been extremely burdensome particularly since charges in the advertising account balances were occurring daily. It is inconceivable that a new list or assignment would have to be prepared each day. The enormity and unreasonableness of such a burden or requirement was recognized by the court in *In re Platt*, 257 F. Supp. 478 (D.C. Pa. 1966) 3 UCC Rep. 717, in which the collateral was described in a financing statement as "Inventory and Accounts Receivable" without using the word "future." Thus the court said at page 720:

> "*A detailed description of the collateral in the case of accounts and inventory would require the filing of daily statements.* The addition of the word 'future' to 'accounts receivable and inventory' would not seem to help an interested party in determining the status of the debtor." (Emphasis supplied)

Appellant Davis in the foregoing argument has made reference to both the February 24 and April 21 memoranda and lists, as well as to the assignment and list which were part of the December 13 agreement without indicating upon which of them his claim was based. However, appellant relies in his claim to a security position upon the advertising accounts and the proceeds thereof listed in the April 21 memorandum and upon the circulation accounts and proceeds thereof to the amount set forth in that memorandum, namely $18,752.58. On the other hand, if the court should reach the conclusion that the February 24 and April 21 memoranda and lists were of no effect and validity as security agreements, then appellant Davis contends that he should be able to recover upon the assignment dated December 13, 1963, at least to the extent of the security, namely $7,837.51, for which circulation accounts were assigned since the validity of the December 13, 1963 agreement and the assignment attached thereto admittedly created a valid security agreement.

Appellant therefore urges the court to hold the April 21 memorandum is to be read together with the Davis December 13 agreement and, on the basis

of the foregoing analysis, constituted a valid security agreement covering both specific advertising accounts named in that memorandum, including future charges thereto and all circulation accounts and charges thereto including future accounts. However, with reference to circulation accounts appellant claims a security interest only in the maximum amount of $18,-752.58, or possibly, in the alternative at least to the extent of $7,837.51) and admits that beyond said sum he must look to the proceeds collected upon the advertising accounts named in the April 21, 1964 list.

The second issue presented is whether—if it be assumed a valid security interest was created in favor of appellant Davis—the charges to the advertising accounts in the April 21 list and to the circulation accounts which came into existence after June 15, 1964 are to be deemed transfers for an antecedent debt coming within the four month period prior to the filing of the bankruptcy petition and therefore voidable preferences as against the trustee.

As noted neither Judge Solomon nor the referee considered this question insofar as it related to appellant's claim. Referee Snedecor conceded that value was given by Davis and a security interest in his favor was created on December 13, 1963 (Rec. 33). Nonetheless it must be presumed that Referee Snedecor would have ruled against Davis with respect to accounts receivable balances and charges created after June 15, 1964 just as he did with respect to the Rose City claim (Rec. 43). On the other hand it must be

presumed that Judge Solomon, had he recognized the security interest in favor of Davis, would have held that such security interest was not affected by the voidable preference problem.

On this hypothesis it would seem this issue is not one for argument in the first instance by this appellant, but rather should first be argued by appellee and then be for response by appellant. It would seem, however, that certain observations as to the fact situation obtaining and perhaps brief argument are in order.

The advertising accounts involved were not isolated accounts with isolated charges arising in the course of isolated transactions. On the contrary, they were not only selected by the controller but were to some extent a selected group, that is, they were accounts which he felt were satisfactory and collectible. The balances on advertising accounts fluctuated daily; there were a multitude of new charges to such accounts, including those in and not in the Davis and DuBay lists, each and every day the newspaper was published. Likewise, the balances of the circulation accounts fluctuated daily. While no specific evidence relative thereto was introduced it appeared to be implicit that payments for advertising space and collections from circulation dealers were received virtually every day the business office was open.

The aggregate of charges made and payments received may not have been identical on a daily basis and on some days may have been at substantial var-

iance one to the other, but over the period of operations were on balance substantially equivalent, although Exhibit 29 discloses that the balances on the advertising accounts specifically named in the Davis April 21 list steadily declined from that date to the filing date. Nevertheless, at all times the aggregate of the balances of these specific advertising accounts, plus $18,742.58, the maximum amount to which the circulation accounts were assigned to Davis, was in excess of the indebtedness to him both at the commencement of the four month period and at the filing date.

Let us sharpen the issue. First, Davis concedes that the bankrupt was insolvent on June 15, 1964 and that he was charged with knowledge thereof. Secondly, Davis agrees that the only time that new value—as distinguished from the substitution of value for value—was given by him was on December 13, 1963 when he first guaranteed the Reporter's obligation to the bank. Thirdly, Davis contends that his security interest covered the balances on October 15, 1964 of all advertising accounts specified in the April 21 list (but no other advertising accounts) and of all circulation accounts to the maximum amount of $18,752.58, without regard to when such circulation accounts were created. Thus, Davis contends that his security interest extended to and encompassed any and all charges to the named advertising accounts and to any and all circulation accounts after June 15, 1964, hereinafter called the post-June 15 charges. Davis further

contends that in view of UCC § 9-108 (ORS 79.1080)* *and the circumstances obtaining*, his security interest was perfected on December 13, 1963 when the agreement of that date was entered into and, accordingly, his security interest effectively attached to the post-June 15 charges upon their coming into being. And he so contends notwithstanding that the bankrupt acquired no rights in the specific post-June 15 charges until they came into being and that under the strict interpretation of the language of UCC § 9-204(2)(d) (ORS 79.2040(2)(d)) it may be contended Davis did not acquire any security interest therein until such time.

The trustee on the other hand contends that the transfers by which such post-June 15 charges became subject to the Davis security interest occurred within the four month period; that during such period the bankrupt was insolvent and to appellant's knowledge; moreover that the indebtedness which said transfers were designed to secure was antecedent, notwithstanding UCC § 9-108 (ORS 9.1080); and that the effect of allowing Davis to claim a security interest in such charges would be to give him a greater percentage of his debt than other creditors of the same class and thereby give him a preference. The trustee further argues that UCC § 9-108 (ORS 79.1080) is in conflict with Section 60 of the Bankruptcy Act and that the Bankruptcy Act prevails. Accordingly, it is the trustee's position that such preference is voidable

* The relevant provisions of the Bankruptcy Act and the Uniform Commercial Code appear in the appendix.

under the provisions of Section 60(a) and (b) of the Bankruptcy Act (11 U.S.C. § 96(a) and (b)).

The referee stated the question to be as follows (Rec. 43):

> "The question posed is whether the perfection of security interests in accounts coming into existence within four months of the bankruptcy may constitute preferential transfers under the prescribed conditions of Section 60 of the Bankruptcy Act."

He then accepted the contentions of the trustee. He was of the view that Section 60 of the Bankruptcy Act and UCC § 9-108 are in conflict, and further, that under UCC 9-204(2)(d) a security interest in accounts receivable can not be perfected until the accounts or the charges thereto come into existence. Accordingly, the referee held that to attach a security interest to charges generated within four months of the bankruptcy filing date would constitute a voidable preference. As a result he expressly disallowed the security interest of Rose City and implicitly disallowed that of Davis.

The only case, other than the instant case, in which the question of the alleged conflict between Section 60 of the Bankruptcy Act and UCC § 9-108, and the validity of the so-called "floating lien," was definitely litigated is *Rosenberg* v. *Rudnick*, 262 F. Supp. 635 (D.C., Mass. 1967).

That case squarely raised the issue as to whether a security interest, "in all the equipment, machinery,

fixtures, inventory and accounts receivable of the debtor, together with all additions thereto and all property now or hereafter substituted therefor and otherwise acquired in the ordinary course of business" effectively covered inventory acquired and accounts receivable arising within the four month period. The trustee, in that case, made the same contentions as were made by the trustee in this one. The court pointed out what a trustee must prove under Section 60 of the Bankruptcy Act to establish a preferential transfer, noted there was no question as to the insolvency of the debtor, the creditor's knowledge thereof and the so-called "antecedent" character of the indebtedness and then stated the problem as follows, at p. 637:

> "The serious question here, however, is when the transfer of debtor's property to Rudnick should be deemed to have taken place. If, as Rudnick contends, the transfer took place with the execution of the security agreement on April 30, 1962 then it took place prior to the four month period preceding bankruptcy, contemporaneously with the creation of the debt, and had the effect of giving Rudnick the status of a secured creditor rather than giving him an improper advantage over other general creditors."

The court observed that the time of transfer must be determined in accordance with Section 60 of the Bankruptcy Act, called attention to the trustee's reliance on UCC §§ 9-204 and 9-303, the same sections relied upon by the trustee in this instance, and went on to say, at p. 638:

"A first literal reading of these provisions would seem to support the trustee's contention. However, § 60(a)(2) does not make the test one of when the state law may denominate a security interest as perfected. The specific test of § 60 (a)(2) is one of when under state law the security interest, however described, becomes one which cannot be defeated by a subsequent lien obtainable in proceedings on a simple contract action. Perfection under state law need not be full perfection but only perfection *so far* as is necessary to meet the test of § 60(a)(2) [Emphasis by Court] * * * Such a lien, after proper compliance with the filing provisions, is superior to a subsequently acquired contract creditor's lien or other claims of third parties except the rights of buyers in the ordinary course of business under § 9-307(1) and holders of perfected purchase money security interests under § 9-312 (3). *In this case the security interest was created by the execution of the security agreement on April* 30, 1962 *and the subsequent compliance with the filing provisions. As of that date the security interest met with the requirements of* § 60(*a*)(2) *and the transfer must be regarded as having taken place on that date.*" (Emphasis supplied)

The court further indicated that UCC § 9-108 presented a different approach to the problem but would have produced the same result. The court, after noting that the validity of that provision had been questioned, said at p. 639:

"Under the Bankruptcy Act the definition of what constitutes an antecedent debt is not one to

be determined by state law. The Bankruptcy Act itself does not define antecedent debt. In view of the fact that the Uniform Commercial Code has now been adopted by 48 states, it would seem that the definition of § 9-108 should be regarded as generally accepted and in accord with current business practice and understanding and hence applied in bankruptcy. *In any event, even if the definition adopted by § 9-108 is not accepted, the section clearly shows that the intent of the Uniform Commercial Code is that a transfer such as the one involved here should not be considered a preferential one,* and the Code's provisions as to perfection and attachment of security interests should not be interpreted to produce a different result." (emphasis supplied)

The only other cases which would seem to cast any light whatsoever upon the problem are those of *In re Newkirk Mining Company,* 54 Berks County, L.J. 179 1 UCC Rep. 468 (1962), and *In re Goodfriend,* 2 UCC Rep. 160 (D.C., E.D. Pa. 1964—apparently not officially reported). In *In re Newkirk Mining Company* a reclamation petition was filed based upon a security agreement which covered "inventory, now or hereafter acquired, used and produced by Buyer in connection with and as a result of mining operations." It did not appear when the after acquired equipment and inventory was acquired. The trustee contended that after-acquired property could not be claimed under the security agreement.

Referee Hiller allowed the reclamation petition, called attention to UCC § 9-108 and the attempt to

avoid conflict with Section 60 of the Bankruptcy Act and said in part at p. 469:

> "I have no trouble in *finding that this petitioner's security interest* in 'equipment' and 'inventory' *extends to after-acquired 'equipment' and 'inventory'* under the explicit provisions of the Agreement itself and that the description of the property contained in Exhibit A of the Security Agreement includes furniture and fixtures. *This will include all after-acquired office furniture and fixtures.*" (emphasis supplied)

In *In re Goodfriend* the security agreement was entered into in connection with the sale of "Kiddy & Women's Wear Shop" and provided that the inventory would constantly be maintained in a minimum amount. The district court upheld the security interest in after-acquired inventory and with reference thereto stated, at p. 161:

> "The language employed clearly created a security interest in the whole inventory. The provision that the inventory was 'to be maintained' at a certain value can only be read to mean that *future items added to the inventory were to be included in the lien.*" (emphasis supplied)

While neither of these cases can be cited as a square holding because of the absence of certainty of the acquisition dates of the after-acquired property both involved inventory. In *In re Goodfriend* inventory must inevitably have been acquired within four months of bankruptcy unless there was a complete cessation of business operations during said period and in view of

the nature of the business this was entirely unlikely. Whether inventory in the *Newkirk Mining Company* case was acquired within four months of bankruptcy may be less certain although it is likely inventory purchases were being made until bankruptcy or shortly prior thereto. It should further be noted that Referee Hiller made no reference to any limitation of time of acquisition and specifically indicated that all after-acquired office furniture and fixtures were included.

An examination of the numerous law review articles and other writings concerning the subject indicates that three theories have been advanced to sustain the floating lien. One is the entity or unitary theory, the second the substituted collateral theory, and the third the automatic perfection theory. The first was expounded in an article by Ray D. Henson entitled " 'Proceeds' Under the Uniform Commercial Code" in 65 Co. L. Rev. 232 (1965), 2 UCC 567. This theory had been given recognition by Judge Magruder in *Manchester National Bank* v. *Roche*, 186 F.2d 827 (1 Cir. 1951) at page 831 where the following appears:

> "Second, it is not without significance that in Section 1 of C. 262-A the New Hampshire legislature specifically provided that the lien on merchandise would be valid from the time of filing the precribed notice 'whether such merchandise shall be in existence at the time of the agreement creating the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the borrower.' In other words, the

res which is the subject of the lien provided in Section 1 is *the merchandise or stock in trade, conceived of as a unit presently and continuously in existence — a 'floating mass', the component elements of which may be constantly changing without affecting the identity of the res.* Cf. Hopkins v. Baker Bros. & Co., 1894, 78 Md. 363, 28 A. 284, 22 L.R.A. 477; Pullman's Palace Car Co. v. Pennsylvania, 1891, 141 U.S. 18, 26, 11 S. Ct. 876, 35 L. Ed. 613. So conceived, it is not inconsistent with the existence of the lien or floating charge on the inventory, as it may be made up at any particular time, that the borrower is free to withdraw an item from stock for sale in the regular course of business, without any obligation to account to the lien holder for the proceeds." (emphasis supplied)

The substituted collateral theory has been urged by Sidney Krause in "The Code and the Bankruptcy Act, Three Views on Preferences and After-Acquired Property," 42 N.Y.U. L. Rev. 278 (1967), and in a lengthy and well-reasoned note in 77 Yale L.J. 139 entitled, "After-Acquired Property Security Interests in Bankruptcy: A substitution of Collateral Defense of the U.C.C." It is also discussed by Henson in the Law Review article previously cited. It has been said that UCC § 9-108 is a codification of this theory, 44 Texas L.R. 1369, citing Gilmore. This theory also influenced Judge Ford in *Rosenberg* v. *Rudnick.*

There would seem to be ample basis for applying the substituted collateral theory to the situation at hand. The balances owing upon the advertising and

circulation accounts were constantly fluctuating with daily charges and virtually daily payments. Referee Snedecor had recognized that if these substitutions occurred through some controlled or policing procedure which would account for the proceeds there would have been no preference problem or question concerning the validity of the security interest on charges arising within the four month period (Rec. 36). (See *In re Pusey, Maymes, Breish Co.*, 122 F.2d 606 (3 Cir. 1941) in which substitutions through a controlled procedure were upheld notwithstanding some question as to complete simultaneity and contemporaneity.) The bankrupt here was not required to account for the proceeds. However, this fact should have had no effect in view of UCC § 9-205 (ORS 79.2050) which expressly repealed *Benedict* v. *Ratner*, supra.

To have required policing or the use of some other procedure whereby accounts receivable were released and new accounts receivable assigned and appropriate documents provided and executed as charges and balances were paid and new charges and balances created would have been exceedingly burdensome. For all practical purposes there were virtually automatic substitutions of new charges for prior charges which were paid and satisfied and on a more or less simultaneous basis. What the Uniform Commercial Code has done is to permit what might be termed an automated substitution process to replace the pre-Code circumscribed procedures.

The third theory, the so-called automatic perfection theory is expounded at some length by Harold Friedman in an article entitled "The Bankruptcy Preference Challenge to After-Acquired Property Clauses under the Code", in 108 Penn. L. Rev. 194, and particularly at p. 214.

Aside from the foregoing theories there are other considerations which dictate sustaining Judge Solomon with respect to the voidable preference question. As both he and Judge Ford in *Rosenberg* v. *Rudnick* pointed out the Uniform Commercial Code has been almost universally adopted. It was designed among other purposes to avoid the *Benedict* v. *Ratner* doctrine, the limiting effects of which had been nullified by factors lien acts, the Uniform Trust Receipts Act, and field warehousing and flooring plans, and other statutory provisions upon and from which the "floating lien" and portions of article 9 are based or derived. See Friedman, op. cit. p. 214 and Peter F. Coogan "Article 9 of the Uniform Commercial Code; Priorities Among Secured Creditors and the 'Floating Lien' " in 72 Harvard L. Rev. 838, p. 843.

Obviously the Uniform Commercial Code was not intended to do away with the objectives and results obtained by such statutes and procedures, but on the contrary to build thereon and to preserve and expand the freedom and flexibility in financing arrangements thus achieved. Clearly the Uniform Commercial Code should be interpreted to continue and promote such freedom and flexibility.

Secondly, the policy underlying the enactment of Section 60 and the objective of its provisions against voidable preferences, namely to prevent one creditor from obtaining a disproportionate share of the total assets of the bankrupt and diminishing the estate which other creditors have a reasonable basis for believing will be available for distribution to them on a prorata basis, are not vitiated by giving effect to the floating lien. Because of notice filing, creditors are apprised of the fact, where the financing statement indicates that inventory and accounts receivable are subject to a security interest, that these assets will or may not be available for distribution to them. Again, where new inventory is acquired with the proceeds of inventory sold or where accounts receivable continually revolve there is in fact no diminution in the estate available for ratable distribution to general creditors—or at the very least no diminution in any way attributable to such security interest.

That the policy behind Section 60 does not require the invalidation of the floating lien upon inventory or accounts receivable created within the four month period is indicated by Coogan in another aritcle entitled "The Effect of the Uniform Commercial Code upon Receivables Financing — Some Answers and Some Unresolved Problems," 76 Harvard L. Rev. 1529. Thus, the footnote appearing at page 1549 reads as follows:

> "While the senior author would not advise a secured party to rely on 9-108, he can see how *a court which looks to the real purpose* of section

> 60 of the Bankruptcy Act *could say* that *the transaction* involved in the typical factual situation where 9-108 would be invoked *is not within the mischief section 60 is intended to cover.*" (emphasis supplied)

Section 60 is directed to a situation in which a creditor either receives a payment on account or gets new and additional security or by some other positive act is placed in a position superior to that previously held, and thus preferred as against other creditors. In the floating lien situation the indebtedness to the creditor has not been reduced, the security available is not increased or added to, nor have any other steps been taken to place the creditor in a better position than he otherwise would have been. The vice against which Section 60 is directed has not happened. All that has happened is that some inventory has been replaced by other inventory of an equivalent, or perhaps lesser but not greater, amount, or that accounts receivable or balances of particular accounts receivable have been replaced by other accounts receivable or balances of an equivalent, or perhaps lesser but not greater, amount; and this results almost automatically from the mere continuance of the debtor's operations in a normal and customary manner.

To disallow the floating lien on replacement inventory and on new charges to accounts receivable would be to deprive secured creditors of valid and enforceable liens and security interests which they had at the commencement of the four month period, and do so without fraud, collusion, connivance, or im-

proper conduct of any kind on the part of the creditor and debtor. It would compel them, to prevent this unfortunate result, to enforce their security interests at the first hint of financial distress and perhaps precipitate liquidation and bankruptcy where patience and consideration might enable, or at least afford time for, a burdened debtor to work out of his difficulties. It is clear that if a creditor proceeds to enforce and bankruptcy and liquidation follow no preference will or can result. To argue that the contrary is true and that the creditor will derive a preference if he permits the debtor to continue operations seems utterly indefensible. It is obvious that the Uniform Commercial Code should not be so construed.

Accordingly, it is submitted that the court should resolve the second issue dealing with the question of the preferential character of the transfers resulting from extending appellant's security interest to post-June 15, 1964 charges in his favor.

CONCLUSION

Appellant urges the Court to conclude that he acquired an effective, valid and enforceable security interest in the balances at the filing date in all advertising accounts receivable specifically named in the April 21 list and in all circulation accounts, to the maximum amount of $18,752.58, and to the proceeds thereof, and also that such security interest was not invalidated as a voidable preference by the pro-

visions of Section 60 of the Bankruptcy Act of charges to such accounts after June 15, 1964. Appellant further urges the Court, on the basis thereof to reverse the order of Judge Solomon with respect to appellant and to direct that judgment by virtue of the December 13 agreement, the assignment and list attached thereto, and the February 24 and April 21 memoranda be entered specifically recognizing the validity of appellant's security interest in the accounts receivable and the proceeds in accordance with his secured claim filed in the bankruptcy proceedings.

Respectfully submitted,

GILBERT SUSSMAN,
SUSSMAN, SHANK & WAPNICK
Attorneys for Appellant,
Robert J. Davis

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this biref, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GILBERT SUSSMAN
SUSSMAN, SHANK & WAPNICK

APPENDIX

DAVIS DECEMBER 13, 1963 AGREEMENT

"AGREEMENT

THIS AGREEMENT is duly executed and made and entered into by and between Portland Reporter Publishing Comany, Inc. (herein called Assignor) and Robert J. Davis (herein called Assignee) at Portland, Oregon, this 13th day of December, 1963.

WHEREAS, Assignor desires to assign to Assignee accounts receivable which are unpaid but which are due and owing or which will become due for advertising services rendered by Assignor, and

WHEREAS, it is the desire of the parties that said assignments be security to the Assignee for his contingent liability upon a Collateral Agreement executed the 13th day of December, 1963, between Assignor and the First National Bank of Oregon.

NOW, THEREFORE, the parties agree as follows:

1. The Assignee will from time to time, during the continuance of this agreement, select such accounts receivable as shall total not less than $35,000 nor more than $40,000 at any one time. In the event that the total amount of the accounts at any time exceeds $40,000, then there shall be a prorata deduction from the accounts so that the total is not more than $40,000.

2. Concurrently with such selection the As-

signor will, by proper instrument in writing, a form of which is attached hereto, unconditionally assign, transfer and set over to the Assignee, his successors and assigns, all of Assignor's rights, title and interest in said accounts.

3. Assignor shall furnish Assignee a statement of its accounts receivable upon request and shall permit Assignee to have access to its books and records disclosing the accounts.

4. In order to avoid objections by, and any possible loss of trade from, any of Assignor's customers, through the collection of said accounts by the Assignee direct from the debtors, it is agreed that the Assignee gives to Assignor the privilege to collect said accounts as the Assignee's agent. Upon such collection, Assignor shall, providing it is in default as defined in paragraph 7, forthwith turn over the proceeds to Assignee and Assignee shall have the full right to deposit the debtor's checks and remittances in his own bank accounts. This agency for collection may be terminated by the Assignee at any time.

5. If any such account cannot be collected within a reasonable time and after reasonable efforts, Assignor will accept a reassignment of said accounts and Assignee may thereupon select another account to be assigned.

6. Upon such assignment, Assignor agrees forthwith to make proper entries on its books and records disclosing the assignment.

7. Any such assignment is for the sole purpose of providing security to Assignee upon his obligation under the agreement heretofore re-

ferred to and it is agreed that so long as Assignor is not in default Assignee shall not be entitled to the proceeds from any account periodically collected but the same shall remain the sole property of the Assignor. Assignor shall be deemed to be in default when Assignor is declared to be bankrupt, is in default on the agreement of December 13, 1963, voluntarily terminates its business, assets or stock.

WITNESS our hands and seals the day and year first above written.

PORTLAND REPORTER PUBLISHING COMPANY, INC.
BY: /s/ ROBERT D. WEBB
Assignor
/s/ ROBERT J. DAVIS
Robert J. Davis"

DECEMBER 13, 1963 ASSIGNMENT

"ASSIGNMENT

Portland Reporter Publishing Company, Inc. herein called Assignor) for valuable consideration, hereby transfers, assigns and sets over to Robert J. Davis, his successors and assigns, all of the right, title and interest of the Assignor in and to the following accounts:

SCHEDULE A

Robert J. Davis Assignment of Accounts Receivable

The following accounts receivable taken as of November 30, 1963, these accounts are marked NOV 30 1963 RJD

[Here appears names of accounts, balances as of November 30, 1963, and paying habits, that is '10 to 60 days,' 'slow,' 'unknown.']

	27,162.49
Circulation accounts receivable to total	7,837.51
	35,000.00

This assignment shall be upon the terms and conditions of the Agreement entered into by and between the parties the 13th day of December, 1963.

PORTLAND REPORTER PUBLISHING COMPANY, INC.
BY: /s/ ROBERT D. WEBB

I hereby appoint Portland Reporter Publishing Company, Inc. through its duly authorized representative as my agent to collect said accounts and disburse the same in accordance with the Agreement of the parties made and entered into the 13th day of December, 1963.

/s/ ROBERT J. DAVIS
Robert J. Davis"

FEBRUARY 21 MEMORANDUM

"MEMO TO: BOARD OF DIRECTORS OF PORTLAND REPORTER PUBLISHING CO., INC., DON S. WILLNER, ROBERT A. BENNETT, AND ROBERT J. DAVIS

FROM: KEITH W. PLOTNER, CONTROLLER
RE: ACCOUNTS RECEIVABLE ASSIGNMENT TO ROBERT J. DAVIS

The following lists of accounts receivable taken as of February 24, 1964 is to show the current standing of the original assignment of these accounts November 30, 1963 and February 24, 1964 RJD.

ACCOUNT NAME AMOUNT AS OF FEB. 24, 1964 PAYING HABITS

[Here appear names of accounts, balances, as of February 24, 1964, and paying habits, that is '15 to 90 days', 'slow'.]

ADDITIONAL CLASSIFIED ASSIGNED AS OF FEBRUARY 24, 1964

[Here appears names of accounts, balances as of February 24, 1964, and paying habits that is '15 to 90 days', 'slow.']

ADDITIONAL DISPLAY ASSIGNED AS OF FEBRUARY 24, 1964

[Here appears names of accounts, balances as of February 24, 1964, and paying habits that is '15 to 90 days', 'slow'.]

$18,309.81

ALL CIRCULATION ACCOUNTS RECEIVABLE ARE HEREBY ASSIGNED IN THE AMOUNT OF $16,690.19

TOTAL $35,000.00"

APRIL 21 MEMORANDUM

"April 21, 1964

MEMO TO: THE BOARD OF DIRECTORS OF THE PORTLAND NEWSPAPER PUBLISHING CO., INC., WALTER EVANS, DON S. WILLNER, ROBERT A. BENNETT, AND ROBERT J. DAVIS

FROM: KEITH W. PLOTNER, CONTROLLER
RE: ACCOUNTS RECEIVABLE ASSIGNMENT TO ROBERT J. DAVIS

The following list of accounts receivable taken as of April 21, 1964 is to show the current standing of the original assignment of these accounts November 30, 1963 and February 24, 1964 RJD.

ACCOUNT NAME	AMOUNT AS OF APRIL 21, 1964
[Here appear names of accounts and balances as of April 21, 1964]	
CIRCULATION A/R	$18,752.56
	35,183.75"

SUBORDINATION AGREEMENT

"AGREEMENT

This agreement is made this 13th day of December 1963, between PORTLAND REPORTER PUBLISHING COMPANY, INC., (hereinafter called Reporter) and ROSE CITY DEVELOPMENT COMPANY, INC., (hereinafter called Rose City).

The Accounts Receivable Loan and Security Agreement between the parties dated November 22, 1963, is hereby modified so as to provide that the agreement of this date between Reporter Robert J. Davis and the assignment of accounts receivable which may take place from time to time in accordance with the provisions of that agreement shall take precedence over the agreement of November 22, 1963, between these partis.

PORTLAND REPORTER PUBLISHING COMPANY, INC.
By s/ ROBERT D. WOBB, President
ROSE CITY DEVELOPMENT COMPANY, INC.
By s/ ASA T. WILLIAMS, SR.

Relevant sections of the Uniform Commercial Code relating to the first issue.

§ 1-102 (ORS 71.1020)

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

§ 1-201 (ORS 71.2010)

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208).

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

The official comment thereon is as follows:

(3) "Agreement." New. As used in this Act the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of this Act to displace a stated rule of law.

(39) "Signed." New. The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this Act a complete signature is not necessary. Authentica-

tion may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

§ 1-205 (ORS 71.2050)

(1) This Act rejects both the "lay-dictionary" vious conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

The official comment thereon contains the following:

1. This act rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

2. Course of dealing under subsection (1) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning. (Section 2-208.)

3. "Course of dealing" may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

§ 2-208 (ORS 72.2080)

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

The official comment thereon contains the following:

> 1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this Article.
>
> 2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this Article carries no contrary implication when there is a failure to refer to it in other sections.
>
> 3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see Section 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

It is recognized that UCC § 2-208 is in the article relating to sales. However, there is nothing in UCC § 1-201(3) referring to this section that indicates the word "Agreement" therein defined means only sales contracts and not security agreements as well, and it would seem that these observations have equal application and should equally be applied to a document which constitutes a security agreement. This was in

fact done in In re Bengston, 3 UCC Rep. 283 (D.C., Conn., Ref. Op. 1965) in which a conditional sales contract constituted the security agreement but failed to comply with certain technical requirements. The Court made reference to the definition of agreement as set forth in the Code and quoted the Official Comment on UCC § 1-205 dealing with "Course of Dealing and Usage of Trade." It also set forth UCC § 2-208 and the Official Comment thereon, and observed that:

> "the parties unquestionably understood the terms of the agreement which at the time of bankruptcy had been in effect for approximately two years during which time there was no apparent difficulty between the parties in interpreting their agreement."

The Court then said, at p. 291:

> "Applying these criteria it is abundantly clear that the parties understood the agreement they made, they conducted themselves without objection under the agreement for a long period of time and a *'liberal construction of the act' applied to promote its underlying purposes and policies dictates that the security agreement be found valid as against the trustee.*" (Emphasis supplied)

§ 9-110 (ORS 79.1100)

> For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

The official comment thereon reads as follows:

The requirement of description of collateral (See Section 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this Section is that the description do the job assigned to it—that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a financing statement. See Section 9-402.

§ 9-203 (ORS 79.2030)

(1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties unless

(b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, a description of the land concerned. In describing collateral, the word "proceeds" is sufficient without further description to cover proceeds of any character.

The official comment thereon reads in part as follows:

1. Here as elsewhere in this Article, following the policy of the Uniform Trust Receipts Act, formal requisites are reduced to a minimum. The

technical requirements of acknowledgment, accompanying affidavits, etc., common to much chattel mortgage legislation, are abandoned. The only requirements for the enforceability of nonpossessory security interests in cases not involving land are (a) a writing; (b) the debtor's signature; and (c) a description of the collateral or kinds of collateral.

3. One purpose of the formal requisites stated in subsection (1) (b) is evidentiary. The requirement of written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured.

5. The formal requisites stated in this Section are not only conditions to the enforceability of a security interest against third parties. They are in the nature of a Statute of Frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies subsection (1) (b), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If he has advanced money, he is of course a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets; he will not, however, have against his debtor the rights given a secured party by Part 5 of this Article on Default. The theory of equitable mortgage, insofar as it has operated to allow creditors to enforce informal security agreements against debtors, may well have developed as a necessary escape from the elaborate requirements of execution, acknowledgment and the like which the nineteenth cen-

tury chattel mortgage acts vainly relied on as a deterrent to fraud. Since this Article reduces formal requisites to a minimum, the doctrine is no longer necessary or useful. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

§ 9-402 (ORS 79.4020)

1. A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

5. A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

The official comment thereon contains the following:

1. Subsection (1) sets out the simple formal requisites of a financing statement under this Article. These requirements are: (1) signatures and addresses of both parties; (2) a description of the collateral by type or item.

2. This Section adopts the system of "notice filing" which has proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed

before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs.

5. Subsection (5) is in line with the policy of this Article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements in which courts have occasionally indulged themselves.

Relevant sections of the Bankruptcy Act and the Uniform Commercial Code relating to the second issue.

The Bankruptcy Act

§ 60a (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or again him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

§ 60b Any such preference may be avoided

by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property, or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however*, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

§ 9-108 (ORS 79.1080)

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acacquired property, his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such

collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

Thes Official Comment thereon is in part as follows:

1. Many financing transactions contemplate that the collateral will include both the debtor's existing assets and also assets thereafter acquired by him in the operation of his business. This Article generally validates such after-acquired property interests (see Section 9-204 and Comment) although they may be subordinated to later purchase money interests under Section 9-312(3) and (4).

Interests in after-acquired property have never been considered as involving transfers of property for antecedent debt merely because of the after-acquired feature, nor should they be so considered. The section makes explicit what has been true under the case law: an after-acquired property interest is not, by virtue of that fact alone, security for a pre-existing claim. This rule is of importance principally in insolvency proceedings under the federal Bankruptcy Act or state statutes which make certain transfers for antecedent debt voidable as preferences. The determination of when a transfer is for antecedent debt is largely left by the Bankruptcy Act to state law.

Two tests must be met under this section for an interest in after-acquired property to be one not taken for an antecedent debt. *First*: the secured party must, at the inception of the transaction, have given new value in some form. *Second*: the after-acquired property must come in

either in the ordinary course of the debtor's business or as an acquisition which is made under a contract of purchase entered into within a reasonable time after the giving of new value and pursuant to the security agreement.

§ 9-204 (ORS 79.2040)

(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights * * *

(d) in an account until it comes into existence.

(3) Except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement.

The Official Comment thereon is in part as follows:

1. Subsection (1) states three basic prerequisites to the existence of a security interest: agreement, value and collateral. When these three coexist a security interest may, in the terminology adopted in this Article, attach. Perfection of a security interest will in many cases depend on the additional step of filing a financing statement (see Section 9-302); Section 9-301 states who will take priority over a security interest which has attached but which has not been perfected. The second sentence of the subsection states a

rule of construction under which the security interest, unless postponed by explicit agreement, attaches automatically when the three stated events have occurred.

2. Subsections (1) and (3) read together make clear that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. (To this general rule subsection (4) states two exceptions.) That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party—such as the taking of a supplemental agreement covering the new collateral — is required. This does not however mean that the interest is proof against subordination or defeat: Section 9-108 should be consulted on when a security interest in after-acquired collateral is not security for antecedent debt, and Section 9-312 (3) and (4) on when such a security interest may be subordinated to a conflicting purchase money security interest in the same collateral.

§ 9-205 (ORS 79.2050)

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contract rights or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to

require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

The Official Comment thereon is in part as follows:

1. This Article expressly validates the floating charge or lien on a shifting stock. (See Sections 9-201, 9-204, and Comment to Section 9-204). This section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral. It repeals the rule of Benedict v. Ratner, 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral. The principal effect of the Benedict rule has been, not to discourage or eliminate security transactions in inventory and accounts receivable — on the contrary such transactions have vastly increased in volume —but rather to force financing arrangements in this field toward a self-liquidating basis.

§ 9-303 (ORS 79.3030)

1. A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Sections 9-302, 9-304, 9-305 and 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

The Official Comment thereon is as follows:

1. The term "attach" is used in this Article to describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in Section 9-204. When it attaches a security interest may be either perfected or unperfected: "Perfected" means that the secured party has taken all the steps required by this Article as specified in the several sections listed in subsection (1). A perfected security interest may still be or become subordinate to other interests (see Section 9-312) but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor. Subsection (1) states the truism that the time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

INDEX OF EXHIBITS

Exhibit Number	Marked	Received
DuBay & Rose City Ex. No. 33	402	402
Davis Exhibit No. 34	416	417
Trustee's Exhibit No. 35	421	422
Trustee's Exhibit No. 36	422	422
Trustee's Exhibit No. 37	423	423
Trustee's Exhibit No. 38	423	423
DuBay & Rose City Ex. No. 39	Received by order on stipulation	
Davis Exhibit No. 40	Received by order on stipulation	